

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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CLARA E. SACKETT,

*Plaintiff in Error,*

vs.

MARY McCAFFREY AND JOSEPH  
McCAFFREY,

*Defendants in Error.*

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TRANSCRIPT OF RECORD.

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Upon Writ of Error to the United States Circuit  
Court for the District of Montana.

**FILED**

MAY 29 1903



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*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

**Caption.**

Be it remembered on the 27th day of August, A. D. 1902, the plaintiff above named filed herein a complaint, which said complaint is entered of record herein as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

**Complaint.**

The plaintiff complains of the defendant and for cause of action alleges:

That the plaintiff is a resident and citizen of the State of New York.

That the defendants are residents and citizens of the County of Deer Lodge, in the State of Montana.

That the matter in dispute in this action exclusive of interest and cost exceeds the sum of \$2,000.

That on the 28th day of May, A. D. 1902, the plaintiff was, and ever since has been, and she now is, the owner of and seised in fee, and entitled to the possession of that certain tract of land, situated in the town, now city, of Anaconda, in the county of Deer Lodge, State of Montana and described as follows, to wit:

All of lot numbered eleven (11), in block numbered eighty-nine (89), in the said town, now city, of Anaconda, according to the plat and survey thereof on file in the office of the County Recorder of said Deer Lodge County.

That the defendants, without right or title, have withheld the possession thereof from plaintiff and excluded the plaintiff from said premises, and now unlawfully and without right or title withhold the possession of said premises from the plaintiff to her damage in the sum of \$100.00.

That the value of the rents, issues and profits of said premises from the said 28th day of May, 1902, and while the plaintiff has been excluded therefrom by the defendants, is at the rate of \$50.00 per month.

That the value of the said premises is \$2,500 and more.

That since the 28th day of May, 1902, and prior to the commencement of this action, the plaintiff demanded of

the defendants the possession of the premises, but the defendants refused, and still refuse to deliver up the same to plaintiff.

Wherefore the plaintiff prays judgment against the defendants.

I. For the recovery of the possession of the demanded premises, and for the sum of \$100, damages for withholding the possession thereof.

II. For the sum of \$50 per month, the value of the said rents, issues and profits, and costs of suit.

W. H. TRIPPET, and  
GEO. B. WINSTON,  
Attorneys for Plaintiff.

State of Montana, }  
County of Deer Lodge. } ss.

George B. Winston, being duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the matters therein stated are true, according to his best knowledge, information and belief.

That he makes this verification in the place of the plaintiff, and on behalf of the plaintiff, for the reason that said plaintiff is now absent from the county of Deer Lodge, State of Montana, where this affiant resides and has his office.

GEO. B. WINSTON.

Subscribed and sworn to before me this 26th day of Aug., 1902.

[Seal] W. H. TRIPPET,  
Notary Public in and for Deer Lodge County, State of  
Montana.

[Endorsed]: Title of Court and Cause. No. 203. Complaint. Filed and entered Aug. 27th, 1902. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy Clerk. Filed on transfer, January 13th, 1903. Geo. W. Sproule, Clerk.

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And thereafter, to wit, on the 27th day of August, A. D. 1902, a summons was duly issued herein, which said summons is entered of record as follows:

*Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

Action brought in said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City of Helena, County of Lewis and Clarke.

### Summons.

The President of the United States of America, Greeting, to the Above-named Defendants, Mary McCaffery and Joseph McCaffery:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 27th day of August, in the year of our Lord one thousand nine hundred and two, and of our Independence the 127th.

[Court Seal]

GEO. W. SPROULE,

Clerk.

By Frederick H. Drake,

Deputy Clerk.

## UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit, District  
of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH Mc-  
CAFFERY,

Defendants.

State of Montana,

County of Deer Lodge.

} ss.

Daniel Lynch being duly sworn, deposes and says:

That he is a citizen of the United States over the age of twenty-one (21) years, and that he is not a party to nor is he interested in the above-mentioned action.

That he received the within annexed summons on the 28th day of August, 1902, and personally served the same on the 28th day of August, 1902, upon Mary McCaffery and Joseph McCaffery, the defendants named in said action, by delivering to and leaving with each of said defendants named in said action, personally, at the city of Anaconda, in the county of Deer Lodge, State of Montana in said District, a certified copy thereof, together with a copy of the complaint in said action certified to by the clerk of said Court and attached thereto.

DANIEL LYNCH.



2. Admit that the defendants are residents and citizens of the county of Deer Lodge, in the State of Montana.

3. Deny that on the 28th day of May, A. D. 1902, or at any other time or at all, the plaintiff was, and ever since has been or was, or ever since has been, or that plaintiff is now the owner of and seised in fee or the owner of or seised in fee, or in any other way or at all, or entitled to the possession of the land described in her complaint, or to any part or parcel thereof.

4. Deny that the defendants, without right or title, have withheld the possession of said land from plaintiff, and excluded the plaintiff from said premises, or now or at any other time, or at all, unlawfully or without right or title, withhold the possession of said premises from the plaintiff, to her damage in the sum of one hundred dollars, or in any other sum or any sum at all, but defendants aver that they have been at all the times in said complaint mentioned in the lawful possession of the whole of said premises, and now and have at all times in said complaint mentioned held and claimed the said premises lawfully and under a valid title.

Deny each and every allegation in said complaint contained not herein specifically admitted or denied.

For a further and separate defense herein these defendants allege:

1. That on the 24th day of November, 1900, and for a long time prior thereto, the defendants Joseph McCaffery and Mary McCaffery were, and now are, husband and wife, and at all of said times the defendant Mary

McCaffery resided, and now resides, with her said husband in and upon the following described land, to wit: Lot numbered eleven (11) in block numbered eighty-nine (89), in the town (now city) of Anaconda in the county of Deer Lodge, State of Montana, according to the plat and survey of said town (now city) of Anaconda, on file in the office of the county recorder of Deer County, which said premises are the premises claimed by and sued for by the plaintiff in this action.

2. That on the 24th day of November, A. D. 1900, and for a long time prior thereto, the said defendants were, and ever since have been, and now are, the owners in fee simple of the above-described land, and the same constituted and now constitutes the homestead of the said defendant Mary McCaffery, and of her said husband, the defendant Joseph McCaffery.

3. That on the 24th day of November, A. D. 1900, the said defendant Mary McCaffery (her husband, the said defendant, Joseph McCaffery, not having made such selection) executed and acknowledged in the same manner as a grant of real property is acknowledged, a declaration of homestead upon and for the above-described land, and the dwelling-house thereon and its appurtenances.

4. That said declaration of homestead so made and executed as aforesaid contained a statement that her husband had not made such declaration of homestead, and that she, the said Mary McCaffery, therefore made such declaration of homestead for the joint benefit of herself and her said husband, Joseph McCaffery, and

a statement that she, the said Mary McCaffery, the person making such declaration of homestead, was residing upon said premises and claimed them as a homestead, and said declaration of homestead contained a description of the above-described premises so claimed as a homestead as aforesaid, and also an estimate of the actual cash value of said premises.

5. That on the 26th day of November, 1900, the aforesaid declaration of homestead was filed for record in the office of the clerk of the county of Deer Lodge, State of Montana, within which said county the premises so claimed as a homestead as aforesaid were situated.

6. That the land so claimed for a homestead as aforesaid did not exceed in quantity one-fourth (1-4) of an acre, and did not, and does not now, exceed in value the sum of twenty-five hundred (\$2500.00) dollars.

That the said defendant Mary McCaffery, at all the times herein mentioned, claimed, and does now claim, the above-described land and the dwelling-house thereon, and its appurtenances, as a homestead for the joint benefit of herself and her husband, the said defendant Joseph McCaffery.

Wherefore the above-named defendants demand judgment that the plaintiff take nothing by this action, and that defendants have judgment for their costs herein.

RODGERS & RODGERS,  
Attorneys for Defendants.

State of Montana, }  
County of Deer Lodge. } ss.

Mary McCaffery, being first duly sworn, deposes and says as follows:

That she is one of the defendants in the above-entitled action, that she has heard read the foregoing answer, and knows the contents thereof, and that the matters and facts therein stated are true of her own knowledge.

her  
MARY X McCAFFERY.  
mark

Witness to the mark of Mary McCaffery:

HIRAM W. RODGERS.

Subscribed and sworn to before me this 13th day of September, A. D. 1902.

[Seal] HIRAM W. RODGERS,  
Notary Public in and for Deer Lodge County, Montana.

Due service of the foregoing answer is hereby admitted, and copy received this 13th day of September, 1902.

W. H. TRIPPET,  
GEO. B. WINSTON,  
Attorneys for Plaintiff.

[Endorsed]: No. 203. Title of Court and Cause. Answer. Filed and entered September 15th, 1902. Geo. W. Sproule, Clerk. Filed on Transfer January 13th, 1903. Geo. W. Sproule, Clerk. Rodgers & Rodgers, Attorneys for Defendants.

And thereafter, to wit, on the 11th day of October, 1902, the plaintiff filed herein her reply, which said reply is entered of record as follows:

*In the United States Circuit Court, Ninth Circuit, for the District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

**Reply.**

The above-named plaintiff, for reply to the further, separate and affirmative defense and answer—

First.—Denies that the said defendants, or either of them, have been the owner of the premises as mentioned in the complaint, or any part thereof, since the 12th day of May, 1902.

Second.—Denies that the said premises, or any part thereof, on the 24th day of November, A. D. 1900, or prior thereto or since, or at any time, or at all, constituted or now constitutes the homestead of the defendant Mary McCaffery or her husband, the defendant, Joseph McCaffery, or either of them; denies that the said premises, or any part thereof, has at any time been, or is now, the homestead of the defendants, or either of them.

Third.—Denies that the defendant Mary McCaffery, on the 24th day of November, A. D. 1900, or at any other

time, executed and acknowledged, or executed or acknowledged a declaration of homestead upon the said land and dwelling-house thereon and appurtenances, or any part thereof.

Fourth.—Denies that the declaration mentioned in said answer of defendant contained a statement or estimate of the actual cash value of said premises, or any statement or estimate of the actual cash value or any value of said premises.

Fifth.—Denies that any declaration of homestead was filed for record or filed in the office of the clerk of the county of Deer Lodge, State of Montana.

Sixth.—Denies that defendant Mary McCaffery at any time mentioned in said answer claimed, or now claims, the said land or any part thereof, and the dwelling-house thereon and its appurtenances, as a homestead, except under the instrument, and as hereinafter mentioned.

For a further reply to the separate defense and affirmative answer of the defendants filed herein, the said plaintiff alleges:

(1) Said plaintiff admits that on the 24th day of November, 1900, the defendant Mary McCaffery executed and acknowledged an instrument purporting to be a declaration of homestead on the premises described in the plaintiff's complaint and in said answer, being the so-called declaration of homestead mentioned in said affirmative answer, and which said instrument reads in words and figures as follows, to wit:

“Know all men by these presents: That I do hereby certify that I am the wife of Joseph McCaffery, and that

I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described.

That the land and premises on which I reside are bounded and described as follows, to wit: Lot number (11) in block number (89), in the city of Anaconda, Deer Lodge County, Montana. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling-house thereon, and its appurtenances, as a homestead.

And I do hereby select and claim the same as a homestead. That I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead. That the actual cash value of said property I estimate to be \_\_\_\_\_.

In witness whereof, I have hereunto set my hand and seal this 24th day of November, A. D. 1900.

her

MARY X McCAFFERY. [Seal]

mark

Witness to mark:

J. T. CASEY.

State of Montana,      } ss.  
County of Deer Lodge. }

On this 24th day of November, A. D. 1900, before me, John T. Casey, a notary public in and for the county and State aforesaid, personally appeared Mary McCaffery, known to me to be the person whose name is subscribed

to the within instrument, and acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[Notarial Seal]

JOHN T. CASEY,

Notary Public in and for Deer Lodge County, Montana.”

(2) The plaintiff admits that on the 26th day of November, A. D. 1900, the said defendant Mary McCaffery filed said alleged declaration of homestead, and had the same recorded in the office of the county clerk of said Deer Lodge County, which said instrument so executed, acknowledged and filed for record as aforesaid is the same and identical instrument, and none other, as mentioned in said answer as a declaration of homestead, executed and acknowledged by the said Mary McCaffery.

(3) But said plaintiff alleges that said instrument at the time of filing thereof did not contain an estimate of the actual cash value of the premises therein described; that by reason of said omission said instrument was not at the time of the filing thereof, or at any time subsequent thereto, and is not now a declaration of homestead, but was at all of the times, and is now, wholly void and of no effect.

And said plaintiff, for a further, separate and partial reply for the said affirmative answer of said defendants, alleges:

(1) The said plaintiff alleges the facts in regard to the declaration of homestead mentioned in said defendant's answer to be as heretofore alleged in her affirmative reply, and to the same extent and as full as men-

tioned in said reply, and as full as if the said allegations in the said affirmative reply were here again repeated.

That at the time of the filing of the alleged declaration mentioned in defendant's answer, and long prior thereto, and ever since the time of said filing, the said defendant Mary McCaffery and her husband, or either of them, did not reside on that part of said lot (11), block (89), described as follows:

“Beginning at a point on the west end line of said lot number (11), in said block (89), from which the northwest corner of said block bears north 13 degrees 40 minutes east, 86.25 feet, and running thence south 76 degrees 20 minutes east at right angle to west end line of lot number (11), 36.50 feet; thence north 13 degrees 40 minutes east, 9 feet; thence south 76 degrees 20 minutes east, 65 feet; thence south 13 degrees 40 minutes west, 12 feet; thence south 76 degrees 20 minutes east, 38.50 feet to a point on the east end line of said lot number (11); thence south 13 degrees 40 minutes west along east end line of said lot number (11), 10.75 feet to the southeast corner of said lot number (11); thence north 76 degrees 20 minutes west, 140 feet to the southwest corner of said lot number (11); thence north 13 degrees 40 minutes east along west end line of said lot 13.75 feet to the place of beginning,” or any part thereof; but that the same was occupied by and rented to tenants of defendant Mary McCaffery; and that the same was not, and could not have been, a homestead, or any part of a homestead of said defendant Mary McCaffery and her husband, or either of them.

(2) That the said tenant premises, at the time of the

filing of the said alleged declaration, and long prior thereto, and ever since said filing, have been entirely separate and distinct from the premises used by defendants, or either of them as a home, and have consisted of said described portion of said lot (11), block (89), together with the dwelling-house and outbuildings on said portion of said lot entirely distinct and separate from the dwelling-house occupied by the defendants, or either of them, as a residence, and from the outbuildings used in connection with said defendants' home; and that during all of said times said described portion of said lot, and said dwelling-house and outbuildings thereon, have been rented and used exclusively by tenants of defendant Mary McCaffery, and occupied by them as a home.

(3) That at the time of filing said declaration, and ever since said time, the said defendant Mary McCaffery and her husband, and each of them, have resided and have had their home upon the other part of said lot (11), block (89), not included in said above description.

Wherefore plaintiff asks judgment as prayed for in her complaint.

GEO. B. WINSTON and  
W. H. TRIPPET,  
Attorneys for Plaintiff.

State of Montana,        } ss.  
County of Deer Lodge. }

George B. Winston, being duly sworn, upon his oath says:

That he is one of the attorneys for the plaintiff mentioned in the foregoing reply for the said plaintiff in the foregoing action.

That said attorney resides in the county of Deer Lodge, State of Montana, that the said plaintiff is a resident of New York, and is now absent from the said county of Deer Lodge and from the State of Montana, and for that reason the said plaintiff cannot verify the foregoing reply.

That the said affiant verifies said reply, by reason of the absence of the said plaintiff from the State of Montana, and said affiant says that the matters stated in the said reply are true to his best knowledge, information and belief.

GEO. B. WINSTON.

Subscribed and sworn to before me this 25th day of September, A. D. 1902.

[Seal]

W. H. TRIPPET,

Notary Public in and for Deer Lodge County, State of Montana.

Service of the foregoing reply is hereby admitted September 30th, 1902.

RODGERS & RODGERS,

Attorneys for Defendants.

[Endorsed]: No. 203. Title of Court and Cause. Reply to Answer. Filed October 1st, 1902. Geo. W. Sproule, Clerk. Filed on Transfer January 13th, 1903. Geo. W. Sproule, Clerk. W. H. Trippet and Geo. B. Winston, Attorneys for Plaintiff.

And thereafter, to wit, on the 26th day of March, 1903,  
a verdict was rendered herein, which said verdict is  
entered of record as follows:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Montana,*

AT LAW.

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

No. 203.

**Verdict.**

We, the jury, sworn to try the above-entitled cause,  
do find for the defendants.

Butte, Montana, March 26th, 1903.

FRED GAMER,

Foreman.

[Endorsed]: No. 203. Title of Court and Cause. Ver-  
dict. Filed and entered March 26th, 1903. Geo. W.  
Sproule, Clerk. By T. B. Stephens, Deputy Clerk.

And thereafter, to wit, on the 31st day of March, 1903, a judgment in accordance with said verdict was duly entered herein, which said judgment is entered of record as follows:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

### Judgment.

The above cause coming on for trial regularly in the above-entitled court, and a regular term of said court had and held in the city of Butte, county of Silver Bow, State of Montana, during the month of March, 1903, the above-named plaintiff appearing by her attorneys, Messrs. Trippett and Howell, and the above-named defendants appearing by their attorneys, Messrs. Rodgers and Rodgers and J. H. Duffy, and the above cause being at issue and for trial in the above Honorable Court before a jury duly impaneled and sworn to try said cause on the 20th day of March, 1903, and each of the above respective parties having introduced their testimony before the above Honorable Court, and aforesaid jury; and after said cause had been duly argued by the said

respective counsel herein, and after having received the charge of the above Honorable Court in the above-entitled cause, the aforesaid jury retired on the 26th day of March, 1903, to deliberate upon their verdict, and afterwards, to wit, on the said 26th day of March, 1903, the said jury returned into court with the following verdict:

“We, the jury, sworn to try the above-entitled cause, do find for the defendants.

“FRED GAMER, Foreman.”

Wherefore, by reason of the law and the premises, it is this 26th day of March, 1903, in open court, ordered, adjudged and decreed that the above-named defendants do have and recover of the above-named plaintiff judgment in the above cause for their costs therein expended, and which costs are taxed at one hundred thirty-two 90.100 (\$132.90) dollars.

And it is further ordered, adjudged and decreed that the plaintiff in the above-entitled action take nothing in said action.

Judgment entered March 31st, 1903.

[Court Seal]

GEO. W. SPROULE,

Clerk.

*In the Circuit Court of the United States, Ninth Circuit,  
District of Montana,*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

No. 203.

**Clerk's Certificate to Judgment-Roll.**

I, George W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court,  
this 31st day of March, 1903.

[Court Seal]

GEO. W. SPROULE,

Clerk.

No. 203. Title of Court and Cause. Judgment-Roll.  
Filed March 31st, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of April, 1903, a bill of exceptions was filed herein, which said bill of exceptions is as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

In Ejectment.

**Bill of Exceptions.**

Be it remembered that the above-entitled cause came on regularly for trial on the 20th day of March, 1903, at a stated term of said Court, to wit, the term of February, A. D. 1903, begun and holden at Butte, in and for the District of Montana, before his Honor, Hiram Knowles, District Judge, sitting with a jury, the plaintiff being represented by Messrs. W. H. Trippet and E. B. Howell, her attorneys, and the defendants by Messrs. Rodgers & Rodgers and J. H. Duffy, their attorneys.

And upon the said trial, the attorneys for the said Clara E. Sackett, plaintiff, to prove her title to the premises in controversy and described in the complaint, offered in evidence the following deeds and records, viz.:

An exemplified copy of the judgment-roll in the case of Mrs. M. A. Sackett vs. Mary McCaffery and Joseph McCaffery, the same being an action brought in the District Court of the Third Judicial District of the State of

Montana in and for Deer Lodge County on the fifth day of December, 1900, in which action judgment was rendered by default against said defendants on January 7, 1901, for the sum of \$1,705.80 and costs, and a decree was entered for the foreclosure of a mortgage upon lot 21 in block 5 of the town of Anaconda, Montana, and for the sale of the said mortgaged premises.

An exemplified copy of the order of sale issued out of said Court to the sheriff of said county of Deer Lodge upon the judgment and decree last above mentioned for the sale of the said mortgaged premises in the manner provided by law, together with the said sheriff's return endorsed thereon showing that in pursuance of said order, on the 31st day of January, 1901, he sold said premises to said judgment creditor for the sum of \$800.00, leaving a deficiency of said judgment amounting to \$1,119.68.

An exemplified copy of the judgment docket of said District Court of Deer Lodge County, showing said deficiency to have been docketed against said Mary McCaffrey and Joseph McCaffrey, judgment debtors, and in favor of said Mrs. M. A. Sackett, judgment creditor, on February 8th, 1901.

An exemplified copy of an execution for deficiency on foreclosure, issued on April 9th, 1901, out of said District Court of Deer Lodge County, upon the deficiency last above described and directed to the sheriff of said Deer Lodge County, directing him to make the amount of said deficiency, to wit, \$1,119.68, together with the legal interest, out of the personal property of said judgment debtors Mary McCaffery and Joseph McCaffery, or

if sufficient personal property of said debtors could not be found, then out of their real property situated in said county of Deer Lodge, together with the return of said sheriff endorsed thereon, showing that on the 8th day of May, 1901, he sold in the manner provided by law all of the property described in the complaint, to wit, lot 11 in block 89 of the town (now city) of Anaconda, in two tracts, the first of said tracts being described as follows, to wit:

“Beginning at a point on the west end line of said lot number (11), in said block (89), from which the northwest corner of said block bears north 13 degrees 40 minutes east, 86.25 feet, and running thence south 76 degrees 20 minutes east (at right angles to the west end line of lot number (11), 36.50 feet; thence north 13 degrees 40 minutes east 9 feet; thence south 76 degrees 20 minutes east, 65 feet; thence south 13 degrees 40 minutes west, 12 feet; thence south 76 degrees 20 minutes east, 38.50 feet to a point on the east end line of said lot number (11); thence south 13 degrees 40 minutes west (along the east end line of said lot number (11); 10.75 feet to the southeast corner of said lot number (11); thence north 76 degrees 20 minutes west, 140 feet to the southwest corner of said lot number (11); thence north 13 degrees 40 minutes east (along the west end line of said lot) 13.75 feet to the place of beginning.”

The second tract being described as all the rest and residue of said lot 11 not included in the portion of said lot last above described.

The first of said tracts having been sold to said Mrs. M. A. Sackett for the sum of \$950.00, and the second

of said tracts having been sold to said Mrs. M. A. Sackett for the sum of \$250.25.

An exemplified copy of said sheriff's certificate of sale issued on May 15th, 1901, to said Mrs. M. A. Sackett in pursuance of the sale on execution last above described.

An exemplified copy of the deed under execution of said sheriff duly executed and delivered on May 19th, 1902, to said Mrs. M. A. Sackett, judgment creditor above described, conveying to said judgment creditor the premises in controversy herein, to wit, all of lot 11 in block 89 of the town (now city) of Anaconda, Deer Lodge County, Montana, under and by virtue of the judgment and execution on deficiency and sale thereunder above named.

An exemplified copy of the deed of Mrs. M. A. Sackett, widow, of Westfield, New York, dated May 8th, 1902, and acknowledged May 28th, 1902, conveying all of said lot 11, block 89 in the said town (now city) of Anaconda, to Clara E. Sackett, her daughter, residing at Buffalo, New York.

Plaintiff further introduced evidence showing that the property in controversy is, and at the time of the commencement of this action was, of a value in excess of \$2,000.00.

And thereupon said plaintiff rested her case.

Whereupon the attorneys for said Mary McCaffrey and Joseph McCaffrey, defendants, for the purpose of showing that the premises in controversy were, at the date of their said sale under execution, exempt from

execution, offered in evidence the following alleged homestead declaration, to wit:

“Know all men by these presents: That I do hereby certify that I am the wife of Joseph McCaffery, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described. That the land and premises on which I reside are bounded and described as follows, to wit: Lot number (11) in block number (89), in the City of Anaconda, Deer Lodge County, Montana. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling-house thereon, and its appurtenances, as a homestead. And I do hereby select and claim the same as a homestead. That I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead.

That the actual cash value of said property I estimate to be \$2,000.00.

In witness whereof I have hereunto set my hand and seal this 24th day of November, A. D. 1900.

her

MARY X McCAFFERY. [Seal]

mark

Witness to mark:

J. T. CASEY.

State of Montana, }  
County of Deer Lodge. } ss.

On this 24th day of November, A. D. 1900, before me, John T. Casey, a notary public in and for the County

and State aforesaid, personally appeared Mary McCaffery, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[Notarial Seal]

JOHN T. CASEY,

Notary Public in and for Deer Lodge County, Montana.

[Endorsed]:

State of Montana,                    )  
County of Deer Lodge.            ) ss.

I hereby certify that the within instrument was filed in my office on the 26th day of November, A. D. 1900, at 50 minutes past 4 o'clock P. M., and is recorded on page 632 of Book "S," Miscl. Records of Deer Lodge County, State of Montana.

Attest my hand and seal:

M. MARTIN,

County Recorder.

Declaration of Homestead of Mary McCaffery. Compared. Indexed."

Whereupon the counsel for plaintiff did then and there object to said offer of evidence on the ground that the same was incompetent, irrelevant and immaterial, for the reason (1) that the said instrument offered in evidence was not stamped, as required by the laws of the United States in force at the date of its execution; and (2) that the notarial certificate of acknowledgment to said instrument offered in evidence was not stamped

as required by the laws of the United States in force at the date of its execution; and (3) that the filing for record of the same in its unstamped condition was in violation of said laws, and the record thereof was void and of no effect as against the rights of plaintiff. But the Court did overrule plaintiff's said objection, and did then and there allow and permit said evidence to be introduced.

To which ruling of the Court counsel for plaintiff did then and there except. Plaintiff prays that this her bill of exceptions to said ruling may be settled and allowed. And the foregoing bill of exception is hereby signed, sealed, settled and allowed this 7th day of April, A. D. 1903.

HIRAM KNOWLES, [L. S.]  
Judge.

The plaintiff offered in rebuttal an exemplified copy of the records of the United States land office at Missoula, Montana. showing that on July 15th, 1896, the defendant Joseph McCaffery made homestead entry of the south half of the northeast quarter, the southeast quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of section 31, township one south, range 15 west, Montana base and principal meridian, containing 160 acres; and that on December 16th, 1901, final certificate number 999 was issued to the said Joseph McCaffery for the said tract; and thereafter, on October 11th, 1902, a United States patent was issued to the said Joseph McCaffery for the said tract.

Which offer of evidence was by the Court refused un-

less plaintiff should promise to follow up said evidence with proof that defendant Joseph McCaffery had at some time actually resided upon said homestead tract, which counsel for plaintiff declared themselves unable to show; whereupon said offer was by the Court refused; to which ruling of the Court the plaintiff then and there by her counsel duly excepted.

Plaintiff presents this her bill of exception to said ruling and asks that the same be settled and allowed. And the foregoing bill of exception is hereby signed, sealed, settled and allowed this 7th day of April, A. D. 1903.

HIRAM KNOWLES, [L. S.]

Judge.

Counsel for plaintiff further offered in rebuttal evidence tending to sustain the allegation of the reply that for several years both before and after the filing of the said declaration of homestead, the principal use of a certain portion of the premises described in the complaint, which portion is in said reply described by metes and bounds, had been and was as tenement property.

In support of said allegation J. H. COLLINS, a witness in behalf of the plaintiff, testified that he knew the defendants Joseph and Mary McCaffery, and knew the house described in the reply as tenant property; that on or about the 12th day of May, 1901, he rented the same from defendant Joseph McCaffery, and moved into said house with his family; that the premises rented by him included the building (with the exception of a one-roomed wooden or frame addition or lean-to on the

(Testimony of J. H. Collins.)

rear thereof, which was reserved by said Joseph McCaffery), the yard in the rear of said building, and the woodshed; that defendant Joseph McCaffery told witness that he reserved said frame lean to or addition because he wanted to sleep there on account of holding possession; that said Joseph McCaffery showed witness the backyard where he would have room to hang clothes-lines, and the woodshed on the back end; that witness and his family occupied four rooms, being all of the brick portion of said house, and paid \$20 a month rental; that the roof of the porch in front of the north house, occupied by the McCafferys, extended across to the wall of the house occupied by witness; that there was access through witness' portion of the backyard to witness' woodshed and through the woodshed to the alley in the rear of the lot; that the frame addition was built right up against the brick part that witness occupied, and connected with it; that the part of the woodshed that witness used was separate from the other part; that witness judges the dwelling-houses on the lot to be within about eight feet of the sidewalk in front of the lot; that witness does not know whether anyone slept in the frame addition while he was there; that he saw a folding-bed in the frame addition but did not notice anything else in there; that witness saw Mr. McCaffery in there maybe 2 or 3 times, but only in the daytime; that witness could and did see into the frame addition from his pantry, through the window, and there was nothing to obstruct the view through the window, no curtain;

(Testimony of David G. Boyd.)

that there was no door connecting the frame addition and the brick part of the southerly house; that the porch did not extend across, that the roof ran over but the porch was separate.

On the same subject DAVID G. BOYD, a witness on behalf of the plaintiff, testified that he had resided in Anaconda a little over five years, and was acquainted with the premises described in the complaint; that in 1898 he rented the southerly house upon said premises, and occupied the same with his family consisting of a wife and three children; that the little frame addition or lean-to next to the kitchen was used by his children as a playroom and by his wife as a storeroom; that there was a woodshed next to the alley used by the witness for firewood; that there was a board fence between the premises occupied by witness and his family and the north part of the lot, which fence ran from the rear of the building occupied by witness to the woodshed. That the portion of the lot occupied by witness at that time backward to where the woodshed was was about the width of the building; that witness paid \$22.50 or \$25 a month as rental for said premises, and rented the same from the defendant Mary McCaffery; that witness occupied said premises about four months, and that the prior occupant of said premises was John Griffin and witness bought his furniture; that witness had nothing whatever to do with the front yard, and if it was ever attended to, it was attended to by the defendants McCafferys.

On the same subject J. T. DULIN, a witness on behalf of the plaintiff, testified that he knew the premises in controversy in this action; that about June, 1900, he examined the southerly house upon said premises with a view to renting it, and was shown the premises by one of the defendants' daughters; that witness saw two houses on the property, one on the north and one on the south, both fronting to the west; that it was the one on the south that witness looked at; that there was a fence on the rear of the lot dividing the lot into two portions; there was no division fence in front of the houses; there was a one-roomed frame addition built on to the back end of the house witness looked at; witness looked into this one-roomed addition and there was nothing in it except perhaps some old rags or something of that kind lying on the floor; there was nothing in the brick portion; that there was a woodshed on the back end of the lot which witness looked at; that there was a fence dividing the two lots at the back end at that time; that according to witness' recollection the fence ran all the way back; that witness did not remember what kind of a fence it was; witness did not rent the property. On cross-examination witness stated that he was certain that there was not a folding-bed in the frame addition; witness went to the door and looked in; witness had not special object or purpose in view in examining the property, further than renting it.

On the same subject W. E. PINEGAR, a witness on behalf of the plaintiff, testified that he was a civil engineer and surveyor by profession; that he is ac

(Testimony of W. E. Pinegar.)

quainted with lot 11, block 89, the premises in controversy; that he made a survey of said lot, he thinks, about the middle of March, 1901; that he made a map of the lot from his survey; that the date on the map is March 16th, 1901, and the map was probably made a couple of days after the survey was made; that the house on the north side of the lot, as represented on the map, witness thinks was occupied by Mr. McCaffery's people at the time he made the survey; that at the east end of the south house, as represented on the map, there is a frame shed; that was a partition in the woodshed on the back end of the lot and the map shows the woodshed and the partition; that the irregular line running from the house to the woodshed at the east end of the lot was a fence; on the map the hatched portion was a porch, covered by a roof connecting the two houses and the sidewalk leading to the porch is also represented; there was an entry between the two houses; the width of that entry between the two houses, as shown by the map, is four feet three inches at one point and six feet at another point; that the fence along the line that witness has drawn on the map between the two parts joined the brickhouse on the south portion of the lot at a point near the northeast corner of the house, which is the most northeasterly corner of the house, the fence began at that point and ran easterly about fifty-two feet, then it went southerly about twelve feet—there was a fence on that line, and from there to the woodshed it was fenced off too; that all the fence referred to was of about the same sort, consisting of a couple of rails

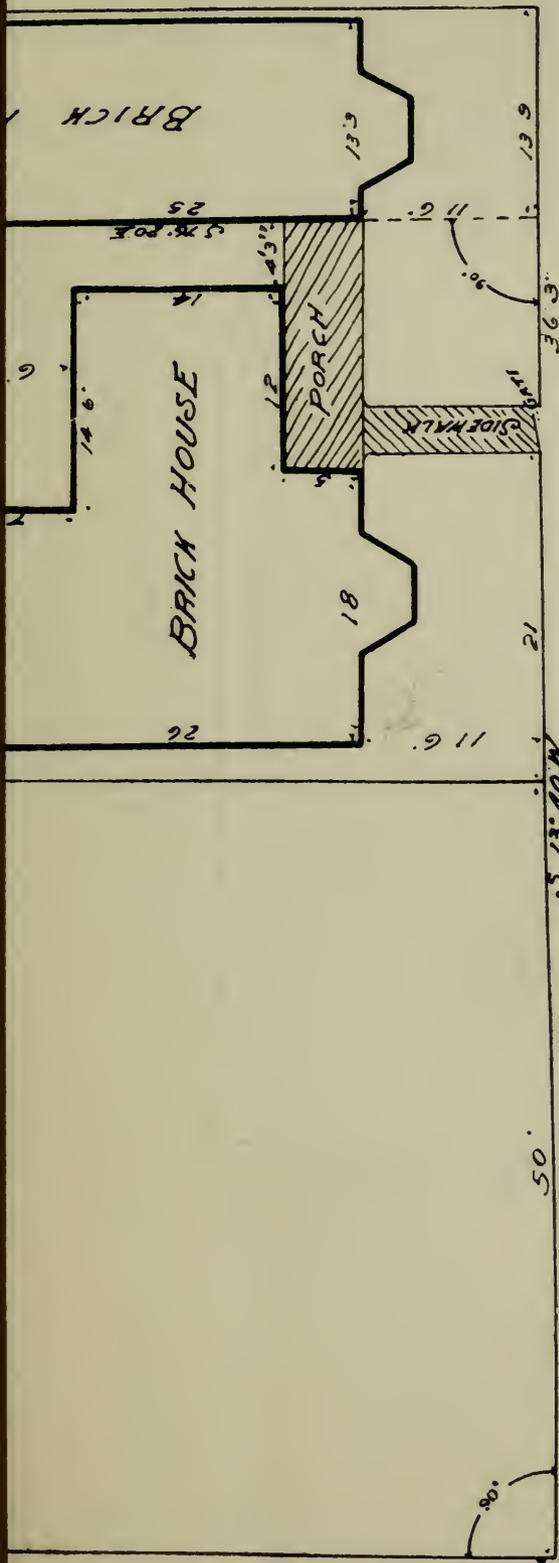
(Testimony of W. E. Pinegar.)

with boards nailed on; that on the north part of the property there was a building at the rear, the north-east corner of the lot, a log house on the corner, that there was a gate in the fence about opposite where the southerly brick building and its frame addition joined; the fence ran parallel with the northerly side of the frame building (addition); the fence was entirely up at that time along the length of it at the time witness made the survey; that the map is a correct representation of what it purports to represent; the description at the bottom of the map is a correct description of the lot that witness surveyed, the south side of that lot.

The map referred to by the witness was produced by him, and plaintiff offered the same in evidence, and the same was received in evidence without objection and marked Plaintiff's Exhibit No. 3, and the following is a copy of said map:

(The clerk will here insert a copy of said map.)





**Cherry Street.**

Description of house and premises on South portion of Lot No. 11, of Block No. 89, Anaconda, Montana, beginning at a point on the west end line of Lot No. 11, of Block No. 89, Original Townsite, Anaconda, Montana, from which the N. W. corner of said Lot bears N. 13 degrees 40 minutes East 36.25 feet, and from which the N. W. corner of said block bears N. 13 degrees 40 minutes E. 86.25 feet, and running thence S. 76 degrees 20 minutes E. 36.50 feet; thence N. 13 degrees 40 minutes E. 9.00 feet; thence S. 76 degrees 20 minutes E. 65 feet; thence S. 13 degrees 40 minutes W. 12 feet; thence S. 76 degrees 20 minutes E. 38.50 feet to a point on the east end line of lot No. 11; thence S. 13 degrees 40 minutes W. 10.75 feet to the S. E. corner of said Lot No. 11; thence N. 76 degrees 20 minutes W. 140.00 feet along the south side line of said Lot No. 11 to the S. W. corner of same; thence N. 13 degrees 40 minutes E. 13.75 feet along the west end of said Lot No. 11 to the place of beginning, containing in all 0.055 acres.

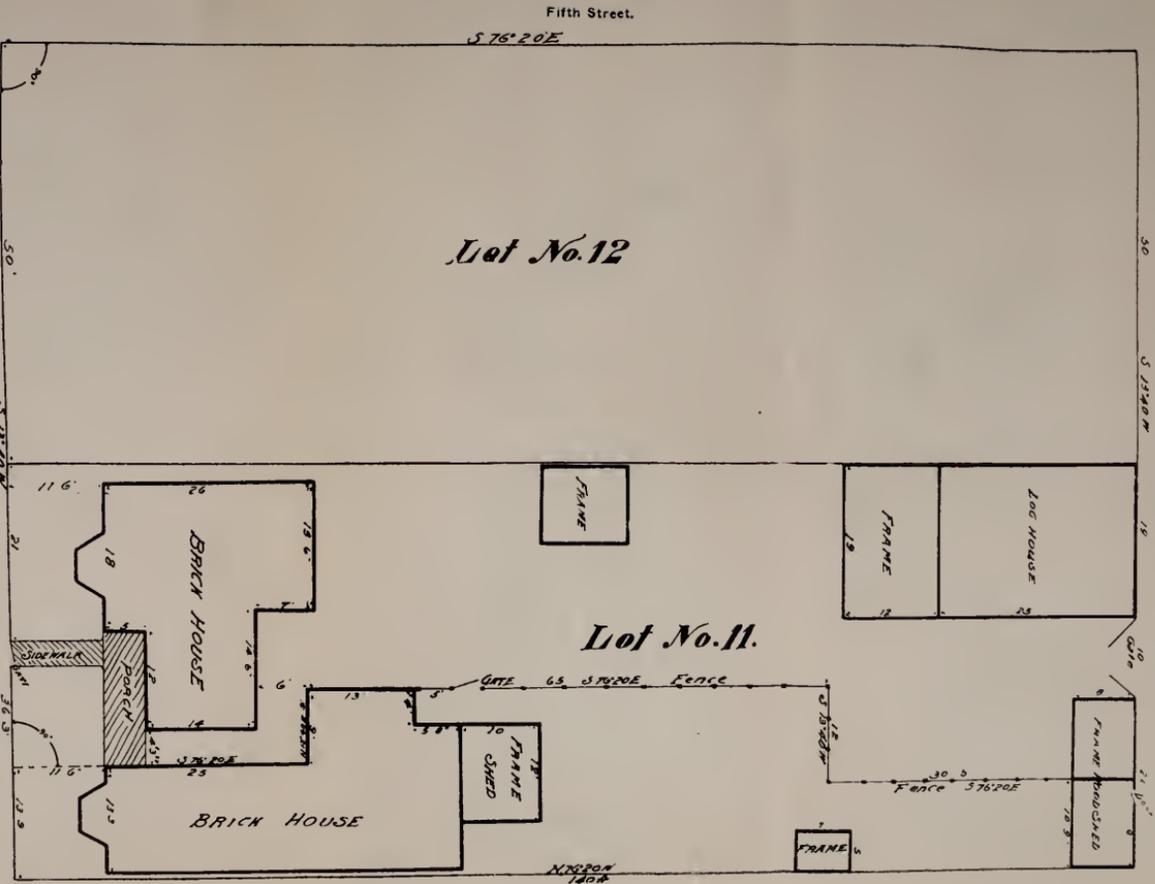
Plaintiff's Ex. 3. No. 203. Filed and entered Mar. 24, 1903. Geo. W. Sproule, Clerk, By T. B. Stephens, Deputy Clerk.

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Plat Showing Lots Nos. 11 and 12, Block No. 89, Anaconda, Mont., March 16th, 1901.

W. E. Plinegar, Surveyor.

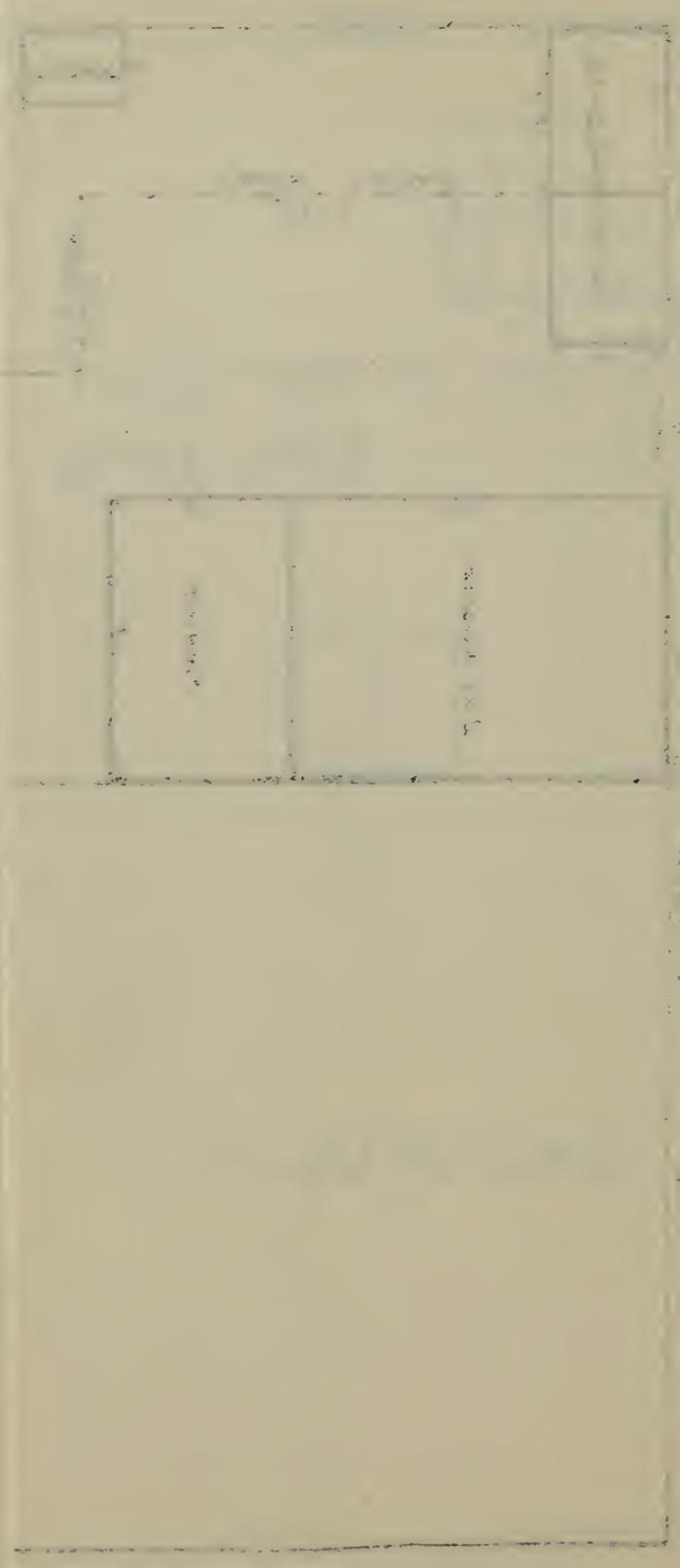


Cherry Street.

Description of house and premises on South portion of Lot No. 11, of Block No. 89, Anaconda, Montana, from which the N. degrees 00 minutes 13 seconds E. 132 feet, and running thence S. 76 degrees 40 minutes E. 90 feet; thence S. 76 degrees 40 minutes E. 28 feet to a point on the east end of lot No. 11; thence S. 13 degrees 40 minutes W. 12 feet; thence S. 76 degrees 40 minutes E. 28 feet to a point on the east end of lot No. 11; thence S. 13 degrees 40 minutes W. 12 feet to the S. W. corner of same; thence N. 13 degrees 40 minutes E. 132 feet along the west end of said lot No. 11 to the place of beginning, containing in all 0.055 acres.

Platting Ex. 3, No. 29. Filed and entered Mar. 24, 1903. Geo. W. Sprague, Clerk, by T. B. Stephens, Deputy Clerk.

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(Testimony of Lizzie McCaffery.)

Said witness further stated that the description by metes and bounds in plaintiff's reply of the property therein referred to as tenant property correctly describes the portion of the premises in controversy occupied by the southerly house, and included within the fence referred to running from the northeast corner of the southerly house to the woodshed. There was no division fence in front of the houses nor between them.

In addition to the foregoing testimony offered by plaintiff in rebuttal, the defendants showed by the testimony of witness LIZZIE McCAFFERY, that at the date of the execution of and filing for record of the alleged declaration of homestead, the four rooms in the brick portion of said southerly house were rented to one Moohr and wife, and that defendants Joseph McCaffery and his wife Mary McCaffery were alternately occupying the frame addition to the said building as a sleeping-room; said witness further testified that for four or five years prior to said date the said southerly building had been rented to tenants in a similar manner; that the fence built from the northeast corner of the southerly house was built of drygoods boxes and strips, was about three feet high and was built to keep the McCaffery chickens out of the southerly yard because they were bothersome to the occupants of the southerly house, and also for the purpose of keeping the chickens out of the garden on the south side, which was kept by the occupants and the McCafferys jointly; that lot 11

described in plaintiff's complaint and covered by defendant's homestead declaration contained less than one-fourth of an acre of land, which fact was shown by the testimony and uncontradicted.

Upon this evidence the plaintiff moved the Court to instruct the jury as follows, to wit:

“Instruction No. 2: Section 1670 of the Civil Code of Montana provides:

The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided.

Under the provisions of this section, the claimant cannot hold two dwelling-houses, one of which he occupies as a residence and the other he lets to tenants. It is the principal use which is made of a house which determines whether it is to be regarded as the residence of the claimant or not. Thus, if the principal use of a house is as the permanent home of the claimant's family, it does not destroy its character as a homestead if one or more rooms are used as a shop in which the claimant carries on his trade or business. In the same manner, if the principal use of a house is as a tenement building, it does not make it the homestead or part of the homestead because some member of the claimant's family may occasionally use one of its rooms as a sleeping apartment.

The above section 1670 also requires that the homestead must be selected in the manner required by law. The requirements of the law are defined to you in these instructions.”

Which motion was by the Court overruled and said instruction refused; to which ruling of the Court the plaintiff then and there in open court, and while the jury was still at the bar of the Court, by her counsel duly excepted.

And plaintiff presents this her bill of exception to said ruling, and asks that the same be signed, settled and allowed.

The foregoing bill of exception is signed, settled and allowed this 7th day of April, 1903.

HIRAM KNOWLES, [L. S.]

Judge.

And upon the said foregoing evidence the plaintiff, by her counsel, further moved the Court to instruct the jury as follows, to wit:

“Instruction No. 6: A homestead cannot include two dwelling-houses, one of which is occupied by the claimant and the other let to tenants.

You are instructed that if you find from the evidence that at the time of filing the homestead declaration in question there were two dwelling-houses upon the premises in controversy, the principal use of one of which was as a residence for defendants and the principal use of the other was as a tenement, then the latter house with the land appurtenant thereto was not properly included in the alleged homestead declaration. Whatever the effect of said declaration as to the building in which the defendants lived, the tenement building, if you find it to have been such as herein defined, remained subject to the lien of plaintiff's deficiency judgment, and in that event plaintiff is entitled to recover such tenement

building with its appurtenant land regardless of the question as to whether said alleged homestead declaration was valid or not."

Which motion was by the Court overruled and said instruction refused; to which ruling of the Court the plaintiff then and there in open court, and while the jury was still at the bar of the Court, by her counsel duly excepted.

Plaintiff presents this her bill of exception to said ruling and asks that the same be signed, settled and allowed.

The foregoing bill of exception is signed, settled and allowed this 7 day of April, 1903.

HIRAM KNOWLES, [L. S.]

Judge.

The foregoing bills of exception are hereby respectfully submitted.

CHAS. E. SACKETT,

E. B. HOWELL,

Attorneys for Plaintiff.

Service of the foregoing proposed bills of exception, and the receipt of a copy of the same, are hereby acknowledged this fourth day of April, A. D. 1903.

J. H. DUFFY,

RODGERS & RODGERS,

Attorneys for Defendants.

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH

McCAFFERY,

Defendants.

**Notice as to Presentation of Bills of Exception.**

To Rogers & Rodgers, and J. H. Duffy, Esq., Attorneys  
for Defendants.

You are hereby notified that the foregoing bills of exception will be presented to the Judge of the above-entitled Court on Saturday, April 4th, 1903, for the settlement of the same during the term at which said cause was tried.

CHAS. E. SACKETT,

E. B. HOWELL,

Attorneys for Plaintiff.

Service of the foregoing notice, and the receipt of a copy thereof, acknowledged this fourth day of April, A. D. 1903.

J. H. DUFFY,

RODGERS & RODGERS,

Attorneys for Defendants.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed and Entered April 7, 1903. Geo. W. Sproule, Clerk. By T. B. Stephens, Deputy Clerk.

And thereafter, to wit, on the 9th day of April, 1903, the plaintiff filed her assignment of error and petition for writ of error herein, which said assignment of error and petition are as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

### Petition for Writ of Error.

Comes now the plaintiff in the above-entitled cause, Clara E. Sackett, and says that on the 26th day of March, 1903, the jury in the above-entitled cause returned a verdict in favor of the defendants and against the plaintiff, and that thereafter, on the —— day of April, 1903, judgment was entered herein in favor of the said defendants and against the said plaintiff for the costs of said action taxed at the sum of \$132.90.

That in said judgment and the proceedings herein had prior thereto in this court certain errors were committed to the prejudice of said plaintiff, all of which will appear more in detail from the assignment of errors which are on file with this petition.

Wherefore, the plaintiff prays that a writ of error may issue in her behalf from the United States Circuit Court of Appeals for the Ninth Circuit, for the correc-

tion of the errors complained of; and that a transcript of the record and proceedings and papers in this case duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit; and for such other orders and processes as may cause said errors to be corrected and the said judgment reversed by the said United States Circuit Court of Appeals for the Ninth Circuit.

Plaintiff further prays that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 8th day of April, A. D. 1903.

CLARA E. SACKETT.

E. B. HOWELL.

Due service of the foregoing petition for writ of error by copy thereof, together with a copy of the assignment of errors accompanying said petition, are hereby acknowledged this 8th day of April, 1903.

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Attorneys for Defendants.

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

CLARA E. SACKETT,	} Plaintiff,
vs.	
MARY McCAFFERY and JOSEPH	} Defendants.
McCAFFERY,	

### Assignment of Errors.

Comes now the plaintiff in the above-entitled action, Clara E. Sackett, by her attorneys, Messrs, Charles E. Sackett and E. B. Howell, and says that in the record and proceedings in this cause there is manifest error in this, to wit:

First.—The Court erred in admitting in evidence the alleged homestead declaration of defendant Mary McCaffery for the reason (1) that the said instrument was not stamped as required by the laws of the United States in force at the date of its execution; and (2) that the notarial certificate of acknowledgment to said instrument was not stamped as required by the laws of the United States at the date of its execution; and (3) that the filing of record of the same in its unstamped condition was in violation of said laws, and the record thereof was void and of no effect as against the rights of the plaintiff.

Said homestead declaration being in words and figures as follows, to wit:

“Know all men by these presents: That I do hereby certify that I am the wife of Joseph McCaffery, and that I do now, at the time of making this declaration, actually reside with my family on the land and premises hereinafter described. That the land and premises on which I reside are bounded and described as follows, to wit: Lot number (11) in block number (89), in the city of Anaconda, Deer Lodge County, Montana. That it is my intention to use and claim the said lot of land and premises above described, together with the dwelling-house thereon, and its appurtenances, as a homestead. And I do hereby select and claim the same as a homestead. That I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead.

That the actual cash value of said property I estimate to be \$2,000.00.

In witness whereof I have hereunto set my hand and seal this 24th day of November, A. D. 1900.

her

MARY X McCAFFERY. [Seal]

mark

Witness to mark:

J..T. CASEY.

State of Montana,            )  
County of Deer Lodge.    ) ss.

On this 24th day of November, A. D. 1900, before me, John T. Casey, a notary public in and for the State and County aforesaid, personally appeared Mary McCaffery, known to me to be the person whose name is subscribed

to the within instrument, and acknowledged to me that she executed the same.

In witness whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[Notarial Seal]

JOHN T. CASEY,

Notary Public in and for Deer Lodge County, Montana.

[Endorsed]:

State of Montana,                    }  
County of Deer Lodge.            } ss.

I hereby certify that the within instrument was filed in my office on the 26th day of November, A. D. 1900, at 50 minutes past 4 o'clock P. M., and is recorded on page 632 of Book "S," Miscl. Records of Deer Lodge County, State of Montana.

Attest my hand and seal:

M. MARTIN,

County Recorder.

Declaration of Homestead of Mary McCaffery. Compared. Indexed."

Second.—The Court erred in rejecting the following evidence offered by the plaintiff, to wit: An exemplified copy of the records of the United States land office of Missoula, Montana, showing that on July 15th, 1896, the defendant Joseph McCaffery made homestead entry of a tract of 160 acres in section 31, township one south, range 15 west, Montana base and principal meridian, and that on December 16th, 1901, final certificate No. 999 was issued to the said Joseph McCaffery for the said tract; and thereafter, on October 11th, 1902, a United

States patent was issued to the said Joseph McCaffery for the said tract.

Third.—The Court erred in refusing to give to the jury the following instruction requested by plaintiff:

“Instruction No. 2: Section 1670 of the Civil Code of Montana provides; The homestead consists of the dwelling-house in which the claimant resides and the land on which the same is situated, selected as in this title provided. Under the provision of this section, the claimant cannot hold two dwelling-houses, one of which he occupies as a residence and the other he lets to tenants.

It is the principal use which is made of a house which determines whether it is to be regarded as a residence of the claimant or not. Thus, if the principal use of a house is as the permanent home of the claimant's family, it does not destroy its character as a homestead if one or more rooms are used as a shop in which the claimant carries on his trade or business. In the same manner, if the principal use of a house is as a tenement building, it does not make it the homestead or part of the homestead because some member of the claimant's family may occasionally use one of its rooms as a sleeping apartment.

The above section 1670 also requires that the homestead must be selected in the manner required by law.

The requirements of the law are defined to you in these instructions.”

Fourth.—The Court erred in refusing to give to the jury the following instruction requested by the plaintiff.

“Instruction No. 6: A homestead cannot include two

dwelling-houses, one of which is occupied by the claimant, and the other let to tenants.

You are instructed that if you find from the evidence that at the time of filing the homestead declaration in question there were two dwelling-houses upon the premises in controversy, the principal use of one of which was as a residence for the defendants, and the principal use of the other was as a tenement, then the latter house with the land appurtenant thereto was not properly included in the alleged homestead declaration.

Whatever the effect of said declaration as to the building in which the defendants lived, the tenement building, if you find it to have been such as herein defined, remained subject to the lien of plaintiff's deficiency judgment, and in that event plaintiff is entitled to recover such tenement building with its appurtenant land, regardless of the question as to whether said alleged homestead declaration was valid or not."

Dated this 8th day of April, A. D. 1903.

CHARLES E. SACKETT,

E. B. HOWELL,

Attorneys for Plaintiff.

*In the Circuit Court of the United States, Ninth Circuit,  
District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

State of Montana, }  
County of Deer Lodge. } ss.

W. H. Trippet, being duly sworn, says that he is a citizen of the United States, of the State of Montana, and of the county of Deer Lodge, in said State; that he is over the age of 21 years; that he was one of the attorneys for the plaintiff in the above-entitled cause on the trial thereof; that on the 8th day of April, A. D. 1903, at the city of Anaconda, in the said county of Deer Lodge, he served the annexed petition for a writ of error in said cause, and the assignment of errors in said cause attached to said petition on J. H. Duffy and H. W. Rodgers (of the firm of Rodgers and Rodgers), attorneys for the defendants in said cause, by delivering to said J. H. Duffy and H. W. Rodgers a copy of said petition for a writ of error and a copy of said assignment of error, attached together as hereto attached, and exhibiting the original to them, and which service was at the office of said J. H. Duffy, attorney, in the said city of Ana-



ica, for the Ninth Circuit, in and for the State and District of Montana, held at the courtroom in the city of Butte, State of Montana, on the ninth day of April, A. D. 1903. Present: Honorable HIRAM KNOWLES, District Judge.

The plaintiff, Clara E. Sackett, having this day filed her petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit, and said petition having this day been allowed:

Now, therefore, it is ordered, that upon the said plaintiff, Clara E. Sackett, filing with the clerk of this Court a good and sufficient bond in the sum of five hundred dollars, to the effect that if the said plaintiff, who is also plaintiff in error, shall prosecute the said writ of error to effect, and answer all damages and costs if she fail to make her plea good, and shall pay the judgment for costs, amounting to the sum of \$132.90, heretofore entered in said cause in this court against said plaintiff, and in favor of the above-named defendants, in case said writ of error be determined against her by said United States Circuit Court of Appeals for the Ninth Circuit;

then the said obligation to be void; otherwise to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this court be, and they are hereby, suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

HIRAM KNOWLES,  
Judge.

[Endorsed]: No. 203. Title of Court and Cause. Order Allowing Writ of Error and Fixing Amount of Bond. Filed and entered April 9th, 1903. Geo. W. Sproule, Clerk. Chas. E. Sackett and E. B. Howell, Attorneys for Plaintiff.

And thereafter, to wit, on the 9th day of April, 1903, a supersedeas and appeal bond, duly approved, was filed herein, which said bond and approval is as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Montana.*

CLARA E. SACKETT,		Plaintiff,
vs.		
MARY McCAFFERY and JOSEPH McCAFFERY,		Defendants.

**Supersedeas and Appeal Bond.**

Know all men by these presents, that Clara E. Sack-

ett, as principal, and the American Bonding Company of Baltimore, a corporation, as surety, are held and firmly bound unto Mary McCaffery and Joseph McCaffery, the defendants above named, in the sum of five hundred dollars, to be paid to the said Mary McCaffery and Joseph McCaffery, their heirs, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our representatives, executors, administrators, successors and assigns, firmly, by these presents.

Sealed with our seals and dated this 9th day of April, A. D. 1903.

Whereas, the above-named plaintiff, Clara E. Sackett, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the District of Montana,

And whereas a judgment for costs in said cause, amounting to \$132.90, has been entered in the above-entitled court against said plaintiff and in favor of the above-named defendants:

Now, therefore, the condition of this obligation is such that, if the above-named Clara E. Sackett shall prosecute said writ of error to effect and answer all interest, costs and damages if she shall fail to make her plea good, and shall pay said judgment for costs, with interest thereon, in case said writ of error be determined against her by said United States Circuit Court of Ap-

peals for the Ninth Circuit, then this obligation to be void, otherwise to remain in full force and effect.

[Seal] AMERICAN BONDING COMPANY OF  
BALTIMORE,

By W. M. BICKFORD,  
Vice-President.

Attest: CHAS. S. PASSMORE,  
Assistant Secretary.

Sufficiency of surety of foregoing obligation approved  
this 9th day of April, A. D. 903.

HIRAM KNOWLES,  
Judge.

State of Montana,            }  
County of Silver Bow.       } ss.

On this 9th day of April, A. D. 1903, before me, the subscribed notary public for the State of Montana, residing in the city of Butte, came Chas. S. Passmore, assistant secretary of the American Bonding Company of Baltimore, Md., to me personally known to be the assistant secretary of the said the American Bonding Company of Baltimore, a corporation described in and which executed as surety the annexed bond, and being by me first duly sworn, stated that W. M. Bickford is vice-president of the American Bonding Company of Baltimore, and that the said W. M. Bickford, as vice-president, and Chas. S. Passmore, as assistant secretary, duly executed the preceding instrument by order and authority of the directors of the said the American Bonding Company of Baltimore; and that the seal affixed to the preceding

instrument is the corporate seal of the said company; that the said corporate seal was duly affixed by the authority of the directors of the said company; that the said the American Bonding Company of Baltimore, of the State of Maryland, is duly and legally incorporated under the laws of the State of Maryland, is authorized under its charter to transact and is transacting the business of a Surety Company in the State of Montana; that said company has complied with all the laws of the State of Montana relating to surety companies doing business in that State; and is duly licensed and legally authorized by such State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its articles of incorporation, and by its by-laws, to execute the said bond; and that said company has assets consisting of capital stock paid in cash and surplus over and above all its liabilities of every kind, exceeding the sum of one million dollars (\$1,000,000.00) and that said W. M. Bickford, as vice-president, and Chas. S. Passmore, as assistant secretary of the said company, have been duly authorized by the board of directors of the company to execute the foregoing bond.

CHAS. S. PASSMORE,  
Assistant Secretary.

Subscribed and sworn to before me, this 9th day of April, A. D. 1903.

My commission expires Sept., 1903.

[Seal]

E. G. SMITH,

Notary Public in and for Silver Bow County, Montana.

[Endorsed]: Title of Court and Cause. Supersedeas and Appeal Bond. Filed April 9, 1903. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 9th day of April, 1903, a writ of error duly issued herein, which said writ of error and answer of the Judges thereto are hereto annexed and are as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, for the District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

**Writ of Error.**

United States of America—ss.

The President of the United States of America to the Honorable Judge of the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, between Clara E. Sackett, plaintiff in said cause and plaintiff in error, and Mary McCaffrey and Joseph McCaffrey, defendants in said said cause and defendants in error, a manifest error

hath happened to the great damage of the said Clara E. Sackett, as is said and appears by the petition herein. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the ninth of May next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals, may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER,  
Chief Justice of the Supreme Court of the United States, the ninth day of April, in the year of our Lord one thousand nine hundred and three.

[Seal]

GEO. W. SPROULE,

Clerk of the United States Circuit Court, Ninth Circuit,  
District of Montana.

Allowed by:

HIRAM KNOWLES,

Judge.



And thereafter to wit, on the 9th day of April, 1903, a citation was duly issued herein, which said citation is hereto annexed and is as follows, to wit:

*In the Circuit Court of the United States, Ninth Circuit, for the District of Montana.*

CLARA E. SACKETT,

Plaintiff,

vs.

MARY McCAFFERY and JOSEPH  
McCAFFERY,

Defendants.

**Citation.**

United States of America—ss.

The President of the United States of America to Mary McCaffery and Joseph McCaffery, Greeting:

You are hereby instructed and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of California, within thirty days from and after the date this citation bears, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, in and for the District of Montana, wherein Clara E. Sackett is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable HIRAM KNOWLES, Judge of the Circuit Court of the United States, in and for the District of Montana, this 9th day of April, 1903.

HIRAM KNOWLES,

Judge.

[Seal] Attest: GEO. W. SPROULE,

Clerk.

Due service of the foregoing citation is hereby admitted, by copy thereof, this 10th day of April, 1903.

J. H. DUFFY and

RODGERS & RODGERS,

Attorneys for Defendants in Error.

[Endorsed]: In the United States Circuit Court, Ninth Circuit, District of Montana. Clara E. Sackett, Plf., vs. Mary and Joseph McCaffrey, Dfts. Citation. Filed and Entered Apr. 10, 1903. Geo. W. Sproule, Clerk. By T. B. Stephens, Deputy Clerk.

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**Clerk's Certificate to Transcript.**

United States of America, }  
 District of Montana. } ss:

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 63 pages, numbered consecutively from 1 to 63, is a true and correct transcript of the pleadings, process, orders, judgment and all pro-

ceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of twenty-three and 45-100 dollars (\$23.45), and have been paid.

In witness whereof, I have hereunto set my hand and affixed the seal of the said United States Circuit Court for the District of Montana, at Helena, Montana, this 20th day of April, A. D. 1903.

[Seal]

GEO. W. SPROULE,

Clerk.

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[Endorsed]: No. 957. In the United States Circuit Court of Appeals for the Ninth Circuit. Clara E. Sackett, Plaintiff in Error, vs. Mary McCaffrey and Joseph McCaffrey, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Montana.

Filed April 30, 1903.

F. D. MONCKTON,

Clerk.

